**J.J. Cassone Bakery, Inc. *and* Bakery, Confectionary and Tobacco Workers' Union, Local 3 *and* Cabrilio Flores *and* Lorenzo Macua.** Cases 2–CA–32559, 2–CA–32778, 2–CA–32941, 2–CA–33144, 32–CA–33267, and 2–RC–22152

December 6, 2005

ORDER REMANDING PROCEEDINGS

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On January 31, 2002, Administrative Law Judge Howard Edelman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed exceptions. In its exceptions, the Respondent asserts that the judge failed to conduct a careful and independent analysis of the evidence. Specifically, it asserts that the judge acted improperly by extensive copying of the posthearing briefs filed by the General Counsel and the Charging Party Union, which provide virtually the entire legal analysis in his decision. The Respondent argues that this conduct demonstrates that the judge failed to consider or address any arguments made by the Respondent in its own posthearing brief. Because it claims this conduct demonstrates that the judge was biased against it, the Respondent asks the Board to order a new hearing.[1]

After carefully reviewing the entire record, as well as the parties' posthearing briefs to the judge, we find merit in the Respondent's criticisms of the judge's decision. We shall order that the case be remanded for review by a different administrative law judge.

We are troubled that Judge Edelman has shown a pattern of extensive copying from parties' briefs, as we reflected in *Dish Network*, 345 NLRB No. 83, slip op. at 1 (2005), and *Fairfield Tower Condominium Association*, 343 NLRB No. 101, slip op. at 1 fn. 1 (2004). For the reasons stated in *Dish Network*, supra, the judge's wholesale borrowing of large portions of the parties' briefs into his decision improperly creates the appearance of partiality in favor of the General Counsel and the Charging Party Union.

Here, supra, two aspects of the judge's conduct in copying the parties' posthearing briefs give the appearance of partiality. First is the extent of the judge's copying. Our comparison of the relevant documents reveals that the majority of Judge Edelman's decision was copied verbatim from the briefs filed by the General Counsel and Charging Party Union. Second, the judge copied verbatim from these briefs both in his factual statement and his substantive legal discussion. The impression given is that Judge Edelman failed to conduct an independent analysis of the case's underlying facts and legal issues.

In order to dispel this impression of partiality, we will remand the case to the chief administrative law ludge for reassignment to a different administrative law judge. We remand this case reluctantly because the transcript of the hearing satisfies us that Judge Edelman conducted the hearing impartially and in an appropriately judicial manner, and we do not suggest that the judge's findings were in error. The new judge shall review the record and issue a reasoned decision. We will not order a hearing de novo, because our review of the record satisfies us that Judge Edelman conducted the hearing itself properly. Additionally, we instruct the new administrative law judge to reopen the record only if necessary. In this regard, the new judge may rely on Judge Edelman's demeanor-based credibility determinations unless they are inconsistent with the weight of the evidence. If inconsistent with the weight of the evidence, the new judge may seek to resolve such conflicts by: one, considering "the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole," *RC Aluminum Industries*, 343 NLRB No. 103, fn. 2 (2004), quoting *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (internal quotation marks and citations omitted); or two, in his/her discretion, reconvene the hearing and recall witnesses for further testimony. In so doing, the new judge will have the authority to make his/her own demeanor-based credibility findings.

ORDER

IT IS ORDERED that the administrative law judge's decision of January 31, 2002 is set aside.

IT IS FURTHER ORDERED that this case is remanded to the chief administrative law judge for reassignment to a different administrative law judge who shall review the record of this matter and prepare and serve on the parties a decision containing findings of fact, conclusions of law, and recommendations based on the evidence received. Following service of such decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall apply.

Dated, Washington, D.C. December 6, 2005

Robert J. Battista, Chairman

[1] Neither the General Counsel nor the Charging Party Union has responded to this concern raised about the judge's decision.

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

*Geoffrey Dunham, Esq.*, for the General Counsel.
*Marc L. Silverman*, and *Nilufer Dalal, Esqs. (Brown & Wood LLP)*, for the Respondent.
*Adrienne Saldana, Esq.*, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

HOWARD EDELMAN, Administrative Law Judge. This case was tried before me in New York, N.Y. on June 27, 28, 29, October 21, 24, December 11, 12, 13, 15, 2000, and February 26, 27, and 28, 2001.

On November 5, 1999, Bakery, Confectionary and Tobacco Workers Union, Local 3 (the Union), filed a charge in Case 2–CA–32559, alleging that J. J. Cassone Bakery, Inc., (Respondent), violated Section 8 (a) (1) and (3) of the National Labor Relations Act. On February 10, 2000, the Union filed a charge in Case No. 2–C–32778, alleging that Respondent violated Section 8 (a) (1) and (3) of the Act. On April 14, 2000, the Union filed a charge in Case 2–CA–32941, alleging that Respondent violated Section 8(a)(1) and (3) of the Act. On July 18, 2000, Lorenzo Macua, an individual, filed a charge in Case 2–CA–33144, alleging that Respondent violated Section 8(a) (1)(3) and (4) of the Act. On September 7, 2000, Cabrilio Flores, an individual, filed a charge in Case 2–CA–33267, alleging that Respondent violated Section 8(a)(1) and (3) of the Act.

Pursuant to the above charges, on February 22, 2000 and May 18, 2000 the regional director issued a Complaint and Notice of Hearing; and on October 19, 2000 the regional director issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing.

Based upon the entire record herein, my observation of the demeanor of the witnesses and briefs submitted by Counsel for the General Counsel, Counsel for the Union, and Counsel for Respondent, I make the following findings of fact and conclusions of law.

Respondent is a New York State corporation engaged in the baking of breads, and other baked goods. Respondent sells such baked goods wholesale, to various retail stores, and retail at its, own store. Its factory and retail shop are located in a single facility located in Portchester, New York. Respondent receives at this facility goods and materials valued at in excess of $50,000 directly from firms located outside the state of New York. It is admitted, and I find that Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7), of the Act.

It is also admitted, and I find that the Union is a labor organization within the meaning of 2(5) of the Act.

Respondents facility is a three story building, including a functional basement, totaling about 100,000 square feet. The basement is primarily used for storage. The first floor houses the production departments, maintenance and sanitation departments, drivers room and loading bays, and the retail store, which is separated by walls from the production area. Respondent's offices are located on the second floor.

Rocky Cassone is an owner and President of Respondent. His sister, Mary Lou Cassone is the other owner and vice president. Directly under the Cassones', is David Locke, the general manager. Directly under Locke is Tony Sena, Locke's assistant, and the night operations supervisor. Respondent operates its production facility on a 24-hour-per-day basis. Respondent contends that its remaining compliment of supervisors prior to the Board election on December 21, l999 were Michael Nagy (engineering), Bill Cranisky (sanitation), Moises Contreras (day packing and ovens), Tony Vanegas (night ovens and packing), and Abey Abraham, (night oven and packing). These supervisors report directly to Locke and Sena. It is admitted by Respondent, and I find that all of the above named individuals are supervisors within the meaning of Section 2 (11) of the Act.

#### The Status of Respondent's Leadman

General Counsel contends that Aurelio Viegas, Guillermo Serra, Jon Cassone, and José Lemus are also supervisors, and agents, within the meaning of the Act. Respondent contends they are leadmen.

Respondent employs a number of leadmen who are in charge of various production lines. Each line consists of about 7 to 10 employees. The leadmen perform considerable manual labor along with the production employees. However, leadmen are paid considerably more in salary than the production employees. Leadmen are salaried employees, whereas production employees are hourly paid. For example, Serra was paid a salary of $860, and Viegas $885. While Jon Cassone was an hourly paid leadman, his hourly rate was $10.30 per hour, far more then the average production employee who received $6.60 per hour. In addition, the leadman received bonuses. In l999, Cassone received $500, Serra, $800, and Viegas $400. Production employees receive no bonuses.

Leadmen are easily distinguishable from the production employees. They wear light green shirts and dark green pants, in contrast to production employees who wear all white uniforms.

The leadmen receive daily instructions from management as to what orders must be filled that day. The leadmen then assign the production employees under them what work has to be performed. The lead man is responsible to insure that the work is done properly and the orders are filled. Leadmen also exercise authority to transfer employees from one line to another in order to make their production more efficient.

While leadmen perform line work with the production employees, they also perform considerable paper work in an office shared by Respondent's admitted supervisors.

The evidence establishes that the production employees consider the leadmen to be their immediate supervisor. With respect to Viegas, on October 27, l999, he issued a written warning to employee Cesar Calderon for speaking to other employ-

ees while he should have been working. On November 9, Abraham, an admitted supervisor was fired. Viegas began to take over his responsibilities. A few days after Viegas began taking over for Abraham, Calderon credibly testified that he told Viegas that he heard that he (Viegas) was taking over for Abraham and Viegas replied: " Well, yes. They told me to do his job." While it is true that Viegas received some training concerning his administrative responsibilities, Viegas admits that he took over all other supervisory responsibilities as of November 9. In January 2000 Viegas granted time off to employee Roberto Lostanau for his daughters communion.

With respect to Serra, on January 10, 2000, he issued a written warning to employee Lorenzo Macua about poor job performance warning him that if he did not do his job properly in the future, he would receive a 3-day suspension. Although the warning letter was signed by Marylou Cassone, the letter stated that Macua must obey orders from Serra.

With respect to Jon Cassone, he is a first cousin to Rocky and Marylou Cassone. The record is replete with testimony by employees and other supervisors that they considered Jon Cassone to be a supervisor. For example, William Bierman who was employed by Respondent as a driver for the past 6 years testified that sometime in October, l999, during the beginning of the Union's organizing campaign, Cesar Calderon solicited him to sign a union card. He took the card and thereafter turned it over to Jon Cassone. When questioned why he would turn the card over to Cassone, he responded: "Because he was the supervisor at the time downstairs." In addition on several occasions in early l999, Cassone gave permission to employee Roberto Lostranau to arrive late on a consistent basis so that he could keep medical appointments. He also set the work hours of employee Antonio Castaneda.[1]

I need not decide whether the above leadmen are supervisors, because I conclude that there are clearly, without any doubt, agents of Respondent within the meaning of Section 2 (13) of the Act.

The Board applies common-law principles when deciding whether an employee is an agent of an employer. Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis to believe that the principle has authorized the alleged agent to perform the alleged acts in question. *Southern Bag Corp.*, 315 NLRB 725 (1994); See generally *Dentch Corp.*, 294 NLRB 924(l989); *Service Employees Local 87 (West Bay)*, 291 NLRB 82 (1988). The test is whether under all the circumstances, employees "would reasonably believe that the alleged agent was reflecting company policy and speaking and acting for management." *Debar Electric*, 313 NLRB 1094, 1095 (1994); *Waterbed World*, 286 NLRB 425 (l987); the Board has held that agency status can be established where a leadman transmits employee directives and is the person among employees who regularly contacts management, or if, as in the instant case the employer makes it clear to employees that the leadmen are the eyes of management. *Injected Rubber Products*, 258 NLRB 687 (1981).

I conclude that the factors described above, and below, would reasonably lead Respondent's employees to believe that Respondent's leadmen were reflecting Respondent's policies and speaking and acting on behalf of management.

As set forth above, Respondent has distinguished them from rank-and-file employees by having them wear different colored uniforms from rank-and-file employees. Employee Macua testified that he believed Viegas and Jon Cassone to be a "boss" because they wore different uniforms. They are salaried employees, earning significantly more money than rank-and-file employees[2] They also receive an annual bonus unlike rank and file employees. Significantly, they do not spend their entire work time on the production lines, but perform paper work in a separate room that they share with admitted Section 2(11) supervisors. This, in and of itself would lead employees to consider the leadmen as supervisors.

There is other evidence that establishes that the employees considered the leadmen to be supervisors. With respect to Jon Cassone: he is a first cousin to Rocky and Marylou Cassone. Employee Bierman testified that he turned over a union card given to him by Calderon over to Jon Cassone because he considered him to be a supervisor, and later testified that when Jon Cassone asked him to get another card, but in English, rather then Spanish, he did so because Jon Cassone was a "manager."

Further, Marylou Cassone informed the employees in writing that they were acting on behalf of management. This is established by her letter dated January 11, 2000, during the Union's campaign, to employee Flores stating that if he failed to obey the instructions of leadman Serra, he would be suspended. It is also obvious that Marylou Cassone considered the leadmen as Respondent's agents as well.

The leadmen exercised other authority over employees that would reasonably lead them to conclude that they were acting on behalf of management. In this connection Jon Cassone exercised his authority to allow employees to come in late without consulting with higher management. For example, employee Lostanau obtained permission from Cassone to come in 15 minutes late for his periodic doctors appointments. Lostanau also received similar permission from Viegas to take time off in order to attend his daughter's communion. Significantly, Viegas issued a written warning to Calderon concerning his talking to other employees during working hours. This warning letter was dated October 27, l999, several weeks before he began assuming the duties of Abraham, an admitted Section 2 (11) supervisor. Leadman Serra admitted giving employee Rosa Macua permission to leave when she complained that she was feeling ill.

Jon Cassone and Viegas also exercised authority to assign employees weekend overtime without consulting management. On weekends they each instructed employee Antonio Castaneda that he had to work overtime because they needed help on

[1] With respect to the factual discussion in this decision concerning the duties and authority of the leadmen, where there was contradictory testimony between General Counsel's witnesses and Respondent witnesses, I credit General Counsel's witnesses. General Counsel's witness testified in detail, and their direct testimony was consistent with cross-examination. Additionally, I was more impressed with their demeanor they appeared to me to be more forthright and less evasive then Respondents witnesses.

[2] Jon Cassone is an hourly paid employee, but he earns significantly more money then the rank and file employees.

the ovens and on occasions Viegas told Lostanau he had to work overtime.

The evidence establishes that Respondent's leadmen exercised authority to transfer employees from packing lines to the ovens and vice-versa whenever necessary. Macua credibly testified that in July of 1999, he observed Jon Cassone and Viegas transfer various employees in this manner. Calderon credibly testified that Viegas, even before he began assuming Abraham's duties on November 9, would frequently transfer him from his regular oven position to packing. As set forth above, Veigas began assuming Abraham's duties after November 9. Employee, Cabrilio Flores, credibly testified that leadman Serra transferred him from his regular oven position to work in packing about three times a week.

Respondent's assistant general manager and night manager testified that he relied on leadmen to move employees to different jobs to keep their production lines working to full capacity, to decide on their own to drop a line, to send sick employees home, and to replace employees who leave early.

Counsel for General Counsel argues that these leadmen are supervisors within the meaning of the Act. I feel that it is a close issue, which I need not decide because I conclude that based upon the facts described above, there is no doubt that by their different dress, their higher salaries, their responsibilities and authorities every employee would reasonably and does consider them to be supervisors, acting on behalf of Respondent. Accordingly I conclude that they are at the very least, agents, within the meaning of Section 2(13) of the Act, acting on Respondent's behalf.

The Union Campaign—Respondent's Knowledge

Since l978, the Union has made five attempts to organize Respondents employees without success. In l988, based upon charges filed against Respondent by the Union, the Board issued a decision concluding that during the course of the Union's campaign, Respondent had unlawfully discharged two employees. *J.J. Cassone Bakery Inc.*, 288 NLRB 406 (l988).

On or about September l999, the Union commenced another campaign to organize Respondents employees. Cesar Calderon, a paid union organizer, became employed by Respondent and immediately began explaining the benefits of the Union and encouraging the employees to sign union cards which he and other employees began distributing to employees of Respondent. In early September Calderon formed a committee of interested employees to lead this organizing drive. The committee consisted of 18 bakery employees.

Respondent became aware of this union activity as soon as it started, probably through employees with management views. In response to such information, Respondent sent a letter to all employees dated September 8, l999 which stated:

> Its that time of the Year again, for almost twenty years the Bakery Workers union has tried to organize J.J. Cassone—and failed. . . .

The letter goes on to inform employees that the Union will try to get them to sign union cards and explains their rights with respect to these cards.

On September 15, Respondent sent its employees another letter explaining "tricks" the Union uses to get employees to sign union cards.

On or about December 18, the Union mailed a pamphlet to all Respondents employees which contained inter alia, the names of the employees on the negotiating committee. Several days later Marylou Cassone displayed a copy of that letter at a meeting with Respondent's employee.

Rocky Cassone admits that as soon as the organizing campaign began in September, he was aware of the main union adherents, that is those employees who were actively engaging in organization activities on behalf of the Union like speaking to employees about the advantages of the Union, distributing, and soliciting employees to sign union cards, passing out flyers and attending union meetings. Rocky Cassone further admits that he knew the names of those employees on the organizing committee even before obtaining a copy of the Union's December 15 letter which set forth their names. Indeed, Rocky Cassone actively sought to obtain such names. This is evidenced by the incident in October between Calderon, employee Bierman, and Jon Cassone, described above, were Bierman gave Jon Cassone the union card given him by Calderon because he believed that Jon Cassone was the "manager." Jon Cassone then turned over the union card to Rocky Cassone who instructed Jon Cassone to tell Bierman to get him a card in English.

The 8(a)(1) Conduct

As set forth above, I have credited all union witnesses based upon their detailed testimony which was consistent on both direct and cross examination and my favorable impression of their demeanor. Additional reasons for such credibility resolutions are set forth below in my discussion of Respondent's discriminatory discharges. Therefore, based upon the credible testimony of General Counsel's witnesses, I conclude Respondent violated Section 8(a)(1) of the act by engaging in the following conduct.

Employers that are so inclined have at their disposal numerous means of communicating to their employees that supporting a union is a risky endeavor. They can threaten a loss of employment or negative changes in terms of employment or let employees know they are being watched, or that it is futile to support a union because nothing will change. Each of these forms of communication are expressly intended to discourage employees from exercising their statutory rights under Section 7 of the Act, and various statements and conduct by employers constitute a forbidden and unlawful expression of antiunion animus towards employees intended to rob them of their right to freely engage in protected conduct in violation of Section 8 (a)(1) of the Act. *Climatrol, Inc.*, 329 NLRB 946 (1999) [threats of loss of benefits, interrogations, threats of loss of jobs], *MZ Movers, Inc.*, 330 NLRB 309 (1999) [creating impression of surveillance, threats of discharge, interrogation]; *Overnite Transportation Co.*, 333 NLRB 1392 (2001) [expressions of futility, threats of a loss of pension benefits]; *Indio Grocery Outlet*, 323 NLRB 1138 (1997) [threatening to have union representatives arrested by calling the police]; *Desert Pines Golf Club*, 334 NLRB 265 (2001 [creating impression of surveillance].

Unlawful Conduct by Aurelio Viegas

Calderon credibly testified that within 6 days of the Union's petition being filed, on November 2, 1999 Viegas approached at least three employees in the lunchroom and threatened that if the Union won the election, the employee's would experience a significant reduction in hours. The practice in the bakery is for employees to work 60–70 hours a week, so when Viegas stated that the Union would insist on 40 hours/week, I conclude this represented a threatened loss of a huge reduction in weekly income. Viegas's credibility with respect to this incident is evidenced when he was asked by Respondent's counsel "how he answered the employees' question" about the benefits offered by the Union. Viegas' answer dealt exclusively with benefits offered by Respondent. He relayed Respondent's benefits in detail, yet could not recall anything about how he answered the question of what security the Union would provide. This testimony is in sharp contrast to Calderon's detailed and credible description of the incident. I find the threat to reduce working hours in violation of Section 8(a)(1).

In another incident of February 4, 2000, Viegas, himself, engaged in an actual denial of an admitted benefit when he prevented Cabrilio Flores from taking some loaves of bread home. Respondent's witnesses admit that this was an accepted practice and that bread was actually set aside for this purpose. When Flores was forced to return the bread, while at the same time being told to get his union friends to buy him bread, I conclude Viegas denied him an employment benefit for unlawful reasons, and in violation of Section 8(a)(1).

Unlawful Conduct by Guillermo Serra

Calderon credibly testified that Serra began uttering his anti-union statements at the same time as Viegas. During the November 8, conversation with Viegas and the employees, described above, Serra threatened employees with discharge by stating that the Union would demand to see green cards and legal documents if it won the election. I find such threat was especially venomous as it appealed to the inherent insecurity of undocumented persons. Once again, Calderon gave a forthright and detailed account of the statement, recalling who was present, where and when it was uttered. Flores' account of Serra's threats of benefit loss and discharge, and Macua's account of Serra's interrogation are similarly detailed.

By contrast, Serra's testimony from the beginning was beset with contradictions. When asked about his conversations with employees, he first says he was neither against nor in favor of the Union, but in his next breath he compared the Union to syndicates that "lied to all of us." "When they took power, they took all the benefits that they had promised were all taken away from us." His next answer, in response to what he said about pensions, is vague and unclear. Serra's credibility is further diminished by his excessively emphatic responses to inquiries about whether he ever discussed issues like green cards with employees: "It has been 30 years and I've never spoken to anyone about green cards." This is juxtaposed with his apparent lack of recollection as to the identity of Cesar Calderon, a man with whom he worked closely, and about whom he testified: "Who is the man?" I conclude the above conduct violates Section 8(a)(1).

Unlawful Conduct by Jon Cassone

On around November 7, in the lunchroom, employees Jose Mario Castro credibly testified he was on his break at around 12:30 to 1:00 p.m. While in the lunchroom, Jon Cassone came in and began saying in a loud voice that the Union wouldn't help the employees, and that no one should believe in the Union movement, nor in Cesar Calderon. Cassone asked if Castro liked the Union and Castro complained about the low salaries and the low raise they received recently. Cassone responded that the employees were going to lose their pension plan.

I find such statement to be a violation of Section 8(a)(1).

Calderon credibly testified that on November 10, at around 4:30 p.m., as he was counting bread, he was approached by Jon Cassone who told him "well, you know what? Abey is fired. (Abraham, a Respondent supervisor) Just back off of the idea of bringing a union in here. All right?". Calderon explained that there was going to be a union election and Cassone responded, "you keep pushing for this, you're fucking up with my family and you're fucking with me; so you're going to see what's going to happen to you."

I find such statement to be threat of unspecified reprisals in violation of Section 8(a)(1).

On November 11, employee Roberto Lostanau credibly testified that he was leaving the restroom. Jon Cassone told him, "you, Peruvian, you're a Union." Lostanau responded that yes, he supported the Union. Jon Cassone then said that if he voted for the union and the union came in "we know you have a wife and three daughters and that your wife is not working. If the union comes in, you're going to be out and you wife is going to have to work; we know how to silence those that are in the Union; we know how to silence you."

I find this to be a threat of discharge in violation of Section 8 (a)(1).

Calderon credibly testified that on around November 12, he was notified of his discharge while in the lunchroom.[3] Following this, he, accompanied by Adan Aguilar, an employee, Jon Cassone, and David Locke, went to his locker in the basement so it could be emptied out. After Calderon observed that it had been broken into and there was nothing left of his personal items, he proceeded to leave the facility. On his way out of the door, Jon Cassone threatened in the presence of Locke and Aguilar "just remember, try to bring the union in here; you're fucking with my family and you're fucking with me, and you're going to see what's going to happen to you again." Since such statement was made in the presence of Aguilar, I find it to constitute a threat to discharge in violation of Section 8(a)(1).

On November 12, after the discharge of Calderon, Aguilar credibly testified that while he was working on the ovens, Jon Cassone came to him and said "you are also involved in the Union and . . . the same thing that happened to Cesar Calderon is . . . going to happen to you." This statement is an advisor reference to Calderon's discharge. I find such statement to be a threat of discharge in violation of Section 8(a)(1).

As set forth I found Jon Cassone is not a credible witness. In fact, I find him to be totally incredible. For example, when testifying as to his authority as a leadman over the employees

[3] Calderon's discharge is discussed in detail below.

on his line when the production supervisor is not in the shop he testified:

A: We (the line employees) all take the responsibility as a team when he's not there.
Q: And as lead man, aren't you the leader of that team?
A: Lead man, yes. Not only me.

JUDGE EDELMAN: Are you the lead man on that team?

MR. CASSONE: On that one packing?

JUDGE EDELMAN: Yes.

MR. CASSONE: Yes.

JUDGE EDELMAN: Well, would your position be somewhat higher in authority than the other individuals on that team as a lead man?

MR. CASSONE: You mean higher?

JUDGE EDELMAN: Higher authority.

MR. CASSONE: Well, Roberto and Jose (other line employees) I ask them and they tell them what to do.

JUDGE EDELMAN: As a lead man, would your position not be higher than the other employees on that machine on that team?

MR. CASSONE: I don't know.

JUDGE EDELMAN: You don't know?

MR. CASSONE: No. We all work together.

JUDGE EDELMAN: But you're the lead man. You must have some responsibility as the lead man. You were selected as the lead man. What is your responsibility over the other employees, if any?

MR. CASSONE: Just working with them in packing the bread.

I find such testimony on a major issue in this case is not only incredible, it's laughable.

Another example of similar testimony is when asked why he wanted to find out whether Calderon was a "Union person", or a "organizer" he testified:

JUDGE EDELMAN: Why did you have to find that out?

MR. CASSONE: Because I work there and benefits I get, and a lot of other worker get are really happy with.

JUDGE EDELMAN: Why was it necessary, you were getting these benefits, why was it necessary to find out whether Mr. Calderon was supporting the union or not.

MR. CASSONE: At the time I was working there this was the first time a union organization ever started when I was there working, I never been through it before.

JUDGE EDELMAN: Well, why was it necessary to find out whether Mr. Calderon was part of the union or a union supporter?

MR. CASSONE: Because a lot of people said so, and I wanted to as him myself.

JUDGE EDELMAN: And, why did you want to ask him?

MR. CASSONE: To see what if he really was or not, or to find out for myself.

JUDGE EDELMAN: Why was it necessary for you to find out for yourself?

MR. CASSONE: I could have thought of going to the union also.

JUDGE EDELMAN: You could have thought about going to the union also?

MR. CASSONE: Yes.

Not only was he evasive, but I found this testimony incredible, unbelievable and laughable.

Unlawful Conduct by Abey Abraham

Salvador Concepcion credibly testified that, shortly after he handed a union card to employee Concepcion Herrera, he was approached by supervisor Abraham who told him "look what you are doing is not right. I am the supervisor and everyone who is involved in anything like that, I'm going to have to fire." Abraham testified that he was aware of the Union's organizing campaign as early as September. Yet he claims not to have known by early November that Concepcion, an employee he supervised, and who had distributed four union cards, was involved with the Union. In light of Respondent's general surveillance of union activities within its facility, it is not plausible that Abraham would not have overheard Concepcion speaking about the Union. Therefore, I find his denial of having threatened Concepcion with discharge is not credible. I conclude such statement was a threat of discharge in violation of Section 8(a (1).

Unlawful Conduct by Marylou Cassone

During the course of Respondent's antiunion campaign Marylou and Rocky Cassone organized employee meetings where they could speak directly to the issues. Referring to two of these meetings, employee Roberto Lostanau credibly testified to the creation of a loan program and employee Jose Mario Castro credibly testified that Marylou Cassone stated that Respondent knew that many employees had signed union cards. I conclude such conduct creates the impression of surveillance in violation of Section 8(a)(1) of the Act. Marylou Cassone admits that there is a loan program for employees who have an emergency, but claims that it has been in operation for years, While Respondent offered exhibits to demonstrate that loans had been given out to employees before the most recent organizing campaign began, what the exhibits demonstrate is simply that twelve employees asked for loans and were granted them. No formal documents were produced to demonstrate that there was a formal loan program and what the terms of that program were. Respondent may have offered those loans to a few of its employees without announcing to the employees in general that there was a loan program. This would explain why Lostanau was hearing of the program for the first time when Marylou Cassone made a formal announcement about it at one of the

employee meetings. Marylou Cassone made no mention of having announced the existence of the program prior to the organizing campaign and, therefore, her general announcement to the assembled employees was, for Lostanau, if not many other employees, announcing a new benefit. I conclude such conduct violated Section 8(a)(1).

Unlawful Conduct by Rocky Cassone

On November 11, Rocky Cassone admits that he called Cesar Calderon into his office and interrogated him about whether he was passing out union cards at work. Respondent attorney contends Rocky Cassone was conducting an investigation into a violation of its "No Solicitation" policy, it is clear from the abundant examples of coercive statements made by its leadmen agents that his intent at this point was to establish a basis for Calderon's subsequent discharge and, as a result of this interrogations, Respondent obtained the information it needed to support the pretextual reason for discharge. In view of my finding that Calderon was later discriminatorily discharged, I conclude such interrogation violated Section 8(a)(1) and (3).

In early December, after his discharge, Calderon credibly testified to appearing in front of the bakery on the sidewalk with a guitar and singing labor songs in Spanish. On one such occasion, he was approached by Rocky and Jon Cassone. Minutes after an exchange of heated words, three police cars appeared and Calderon was questioned intently about his car insurance and he was told that Respondent was accusing him of trespassing. The timing of the incident, shortly after Calderon's discharge allows for a strong inference to be drawn that Rocky Cassone contacted the police with the intent of having him arrested. I find such conduct to constitute harassment in violation of Section 8(a)(1).

The Unlawful Discharges

Under the Board's decision in *Wright Line*, 251 NLRB 1083 (1980), approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), General Counsel must make a prima facie showing of sufficient evidence to support the inference that protected conduct was a motivating factor in the employer's decision to terminate, suspend or otherwise discipline an employee. Once this is established the burden then shifts to the employer to demonstrate that the same action would have been taken even in the absence of protected conduct. The question, then, is not whether the employer could have taken the adverse action, but whether it would have done so in the absence of the discriminatee's union activities. *Standard Sheet Metal, Inc.*, 326 NLRB 411 (1998). Thus, Respondent must persuade by a preponderance of the credible evidence that it would have taken the actions described herein in the absence of each discriminatee's protected activities in support of the Union. *T&J Trucking, Co.*, 316 NLRB 771 (1995). Further, the status of union organizers who are hired as employees is no different than other employees; they receive the same protection under the Act. *Town and Country Electric, Inc.*, 309 NLRB 1250 (1992).

As soon as the union organizing campaign began in September, Respondent knew the identify of the main union adherents. As Rocky Cassone testified, "I knew in early September that Cesar Calderon and Adan Aguilar were leading the organizing drive." The 8(a)(1) violations described above establish that Respondent wasted no time plotting to crush the nascent campaign and began, in early September, to inundate the employees with its own campaign letters. Respondent's earliest campaign letter is dated September 8 and, in its second letter of September 15, Rocky and Marylou Cassone began; "since we last wrote you, we understand that the union salesmen have been busy trying to get you to sign cards."

At least by December 15, or a few days before, as Rocky Cassone testified, Respondent was aware that all of the alleged discriminates were leaders of the union campaign. Each discriminate is listed in the letter which Rocky Cassone obtained, as a member of the Union's organizing committee. Rocky Cassone admits he knew of the committee "at least a couple of days before the letter came out," and probably even before. This is a clear inference that employees or supervisors were reporting to him about union activities within the bakery and who were the leaders among its employees. This is demonstrated by the incident involving Calderon and Bierman, where, according to Bierman, Jon Cassone acted as an intermediary passing along the union cards from Bierman to Rocky Cassone and even returning with instructions for Bierman to get cards in English.

In addition to Calderon and Aguilar, several alleged discriminatees engaged in their own union activities. Flores distributed flyers for at least 2 days in November on the sidewalk in front of the bakery. Lostanau was vocal at Respondent's campaign meetings and specifically questioned Marylou Cassone as to why she was afraid of the Union. Salvador Concepcion distributed four union cards and often spoke about the Union in the lunchroom. On one occasion, he recalls a manager named David, probably David Locke, walking into the lunchroom when he was speaking to a fellow employee about the Union. Jose Mario Castro served as the Union's observer during the December 21 election. Lorenzo Macua participated in the organizing drive by distributing 18 cards to employees. I find that Respondent was aware of all of this activity by being informed by supervisors, leadmen, and anti-union employees.

Each of the above described activities in support of the Union preceded Respondent's commission of unfair labor practices against the individual discriminates. Respondent knew and had possession of the December 15 letter prior to the unfair labor practices committed against each discriminatee except for Calderon, Aguilar, and Concepcion. However, Rocky Cassone admitted to knowing of Calderon and Aguilar's union activities as soon as early September. Of the 18 names on the December 15 letter setting forth the names of the employees on the Union's organizing committee, Respondent knew that Marcelino Cortez and Ricardo Espinosa no longer supported the Union. Of the remaining committee members, almost 45 percent were disciplined by Respondent either before or after the election by being discharged or suspended.

Thus, knowledge of the alleged discriminatees' union activities has been established before the alleged discrimination, the timing of the alleged discrimination is coextensive with Respondent's intense and systematic Section 8(a)(1) activity. The knowledge, animus, and timing are above sufficient to establish General Counsel's *Wright Line* burden. However, General

Counsel's prima facie case becomes extremely strong when one considers the fact of the 18 names on the December 15 union committee letter, described above, Respondent also knew that Marcelino Cortez and Ricardo Espinosa no longer supported the Union. Of the remaining committee members, almost 45 percent were discharged and or otherwise disciplined during the union campaign.

The Board, supported by the Courts, has long held that where alleged discrimination includes a disproportionate numbers of union adherents, this constitutes persuasive evidence of discrimination. *Huck Store Fixture Co.*, 334 NLRB 119 (2001); *Glenn's Trucking*, 322 NLRB No 87 (2000) (not included in bound volumes); *American Wise Products*, 313 NLRB 989, 994 (1994); *Power Inc. v. NLRB*, 40 F 3d. 409, 418 (D.C. Cir. 1994); *Hedison Mfg. Co.*, 249 NLRB 791, 804 (1980); *Camco Inc.*, 140 NLRB 361, 365 (1962) enfd. in pertinent part 349 F. 2d 803, 810 (5th Cir. 1`965); *NLRB v. Nabors*, 196 F. 2d 272, 375–376 (5th Cir. 1952); *NLRB v. Chicago Steel Foundary* 142 F. 2d 306, 308 (7th Cir. 1949).

As the D.C. Circuit phrased the issue in *Chicago Steel supra*, "To be sure, percentage evidence; standing alone will not support or sustain an order based on Section 8(3) of the Act . . . But the disproportionate treatment of union or nonunion workers may be very persuasive evidence of discrimination . . . and may create an inference of discrimination leaving it to the employer to give an adequate explanation of the discharge or layoff." Id. at 308.

Thus, Respondent faces a huge *Wright Line* burden to overcome General Counsels' very strong prima facie case.

The Supervision of Cesar Calderon

Respondent admits that by early September it knew that Calderon was leading the Union's organizing drive. Respondent's animus towards the Union, its actions towards Calderon since September can only be viewed through the prism of a determined antiunion animus. Indeed I conclude that Respondents' reasons for Calderon's suspension and discharge are so transparent as to contain not a shred of credibility.

On November 1, while at his oven, Calderon responded to a commotion involving Salvador Concepcion and Abey Abraham. It is undisputed that he left his oven area, along with Adan Aguilar and Roberto Diaz who also responded to the commotion. The credible testimony by the employees who were actually in the oven area, namely Calderon and Aguilar, establishes that, at the time they left the oven, the final board of rolls was baking in the oven and the next type of bread to be baked, postillin, was in the steam box. Respondent acknowledges that, after Calderon left the oven, he acted in the Respondent's own interests in dealing with Concepcion in his altercation with Abraham, as described below. The only other action Calderon took while away from his oven was to act as the translator between Concepcion and the policemen, who were called to the scene by Abraham. This was done at the request of Concepcion who was being handcuffed and was unable to communicate with the police, who did not speak Spanish. When Calderon asked if he could act as translator one of the policemen said that he could. In fact, Calderon testified, that upon returning to the oven, Respondent supervisor Viegas thanked him for translating. It makes sense that Viegas would thank him because Calderon's conversation with the police facilitated Concepcion's removal from the facility. In fact, not one Respondent witness suggested that Calderon was acting against Respondent's interests by either restraining Concepcion or translating for the police. Respondent's sole response to Calderon's 15 minute absence from the oven was a tenuous claim that rolls were lost. Yet Calderon and Aguilar, two of three individuals who actually worked the oven, credibly testified that no bread was lost. Indeed no bread could have been lost because, when Calderon returned to the oven, the last board of bread that he had put on the conveyor belt was still baking in the oven. The postillin was still in the steam box, not ready for baking, and, furthermore, it was Aguilar's responsibility to remove that bread from the steam box. Respondent's witnesses could not dispute these facts and, therefore, I conclude Respondents assertion that dozens upon dozens of rolls were lost is simply not supported by any evidence in the record. Moreover, Respondent's assertion that bread was lost is belied by the admitted fact that, of the three workers assigned to the oven, only Calderon received discipline. Additionally, not one of Respondent's witnesses claimed to have told anyone working the ovens at that time that any rolls or bread were lost. This, despite the fact that it was the supervisor's practice to so inform employees who caused bread to be lost. Moreover, no Respondent witness claims to have told Calderon to return to the oven area. In particular, Viegas admits to not having told Calderon to return to the ovens. Incredibly, Viegas testifies later on that he did not tell Calderon to return to the ovens because he did not have the authority to do so. This is the same person who, days earlier, signed a written warning issued to Calderon as his supervisor. The veracity of Viegas' testimony is again severely compromised by his testimony that Calderon was away from the oven for 45 minutes when the warning and Locke say he was gone for only 15 minutes. The inescapable conclusion is that Calderon's efforts to assist with a police investigation initiated by Respondent, and to help calm an altercation between Concepcion and Abraham gave Respondent the opportunity it desperately sought to discipline Calderon and prepare the way for his ultimate discharge. For this conduct Respondent suspended Calderon for 3 days. I find such suspension violated Section 8(a)(1) and (3).

The Discharge of Calderon

The is no dispute that during October 1999 Calderon handed a union authorization card to Billy Bierman while he was working at the oven. While this might arguably violate Respondent's broad no solicitation/no distribution rule, Respondent contends that the *sole* reason for Calderon's discharge was that Calderon, as Rocky Cassone rather dramatically put it, "was that Calderon . . . lied . . . blatantly lied." Despite this assertion, a close examination of Bierman's testimony establishes the underlying entrapment that took place.

Bierman's testimony establishes that he was under Respondents' directive to obtain an authorization card from Calderon. After Bierman testified that he wanted noting to do with the Union and that it was Calderon who offered the cards to him. Bierman then states that, having received the cards from

Calderon in Spanish, he asked for them in English. Calderon confirms that he only had cards in Spanish and that, after giving those to Bierman, at Bierman's request for cards, Bierman asked for two cards in English. Critically, Bierman admits that he asked for more than one card, which supports Calderon's testimony that Bierman intended to distribute a card to his friend in the retail bakery. Yet, even on this point, Bierman's testimony shifts from admitting that he requested a card for Laurie in the bakery to saying that he asked for a card in English because Jon Cassone wanted one. Bierman's testimony makes clear that the card was not intended for Jon Cassone's personal use. When questioned as to whether Jon Cassone asked him to get a card in English, the response was, "well, the conversation went that way, that *we* (emphases added) need one in English." Bierman later admitted that the only reason he asked for a card in English was to give it to Respondent, Rocky Cassone, and "let them deal with it."

Even without receiving a card in English, Respondent dealt with it. Within a day of Bierman receiving a cards from Calderon, he was approached by Marylou Cassone who knew all about his having received cards from Calderon. Bierman was called into a meeting with Rocky and Marylou Cassone and was immediately told to sign a deposition to be used against Calderon. Knowing that Calderon would deny distributing cards during working hours, Rocky Cassone questioned Calderon solely to obtain his denial and hence, his pretextual reason for his termination.

Moreover, the record further establishes that Respondent had an established practice of not enforcing its "No Solicitation" rule by permitting outside vendors and employees to sell items inside the bakery. Numerous witnesses testified that employees took collections for money to assist other employees in need. Employees would sell candy on behalf of their children, a Chinese man sold his wares in the lunchroom every week from as early as 1993 and as recently as April, 2000, Abraham sold raffles for his church during working hours, Jon Cassone sold shoes on various occasions inside the bakery. Despite Respondent's assertion that it took steps to prohibit this activity, the overwhelming evidence is that it was tolerated for years within the bakery. Inconsistent application of a no solicitation rule violates Section 8(a)(1). *Harris-Teeter Super Markets*, 307 NLRB 1075, 1086 (1992).

I thus find Respondent has failed to meet its *Wright Line* burden, and that Calderon was discharged in violation of Section 8(a)(1) and (3).

The Suspension of Adam Aguilar

On the day of Calderon's discharge, Aguilar found himself in the lunchroom just when Calderon was handed his termination letter and told to get his belongings and leave the facility. Calderon asked Aguilar to accompany him to the lockers in order to serve as a witness, since he was unsure of what might transpire given Jon Cassone's presence. Though Aguilar and Calderon do not share a locker, it is Locke's, Respondent's General Manager's testimony, that Aguilar told him they did, and that this was why he was accompanying Calderon to the basement locker room. Throughout the whole of Locke's description of what transpired, Aguilar is not alleged to have said or done anything else. In fact, Locke testified that after Calderon left the locker room and facility, "Mr. Aguilar went back to work." Nevertheless, for his troubles in simply accompanying Calderon to his locker, Aguilar received not just a suspension, but a suspension of indefinite duration. Why? Locke claims that Aguilar told him that he and Calderon shared a locker in the basement. Yet, in the same general area where Locke was handing Calderon the termination letter, Aguilar was at his locker, taking his jacket off and preparing for work. In describing how upset he was after what had happened, Locke testified that he immediately went to Marylou Cassone and told her what had just transpired: that in his opinion, they did not share a locker and that Calderon did not have a locker downstairs. That was the worst Locke conjure up until Respondent's counsel offered the leading question "and Aguilar was not telling you the truth when he said they shared a locker?" I agree with General Counsel argument in his brief that if Respondent's general manager needs to be led to provide the answer for why an employee received an indefinite suspension, it is clear that the proffered reason is a pretext. Apparently unsure whether the supposed "lie" would be sufficient, owner Marylou Cassone offered up another reason for Aguilar's suspension, that is, "for taking up management's time on a wild goose chase." Oddly, though, it was not Aguilar who Locke was following, but rather Calderon, for it was the latter's locker that they were seeking. All Aguilar did was to follow Calderon to his locker in the basement locker room. That this scenario strains credulity is demonstrated by Marylou Cassone and Lockes' conflicting testimony. While Locke stated it was Aguilar who said they shared a locker, Marylou Cassone testified that it was Calderon, and not Aguilar, who claimed they shared a locker. I find such contradicting testimony adversely effects both witnesses credibility. Even were the testimony of Respondent's witnesses to be accepted, it cannot even be said that Aguilar lied, as they never did determine for sure where Calderon's locker was located. One might suppose this would further remove Aguilar from Respondent's wrath but, to the contrary, so severe did Marylou Cassone consider Aguilar's imagined transgression that she claims she would have fired him as a result of this incident, had not counsel advised otherwise. It is clear to me that Respondent's witnesses are ostensibly overcompensating in inventing justifications for an extremely severe discipline where they had no legitimate reason for imposing any discipline on Aguilar. Aguilar's transgression, as is more than apparent, was to actively support Calderon and the Union. I conclude that Respondent's reason for the indefinite suspension is already pretextual, and not merely sufficient to establish its *Wright Line* burden. Thus I conclude that Aguilar's indefinite suspension was in violation of Section 8(a)(1) and (3).

The Discharge of Aguilar

On or about December 16, Rocky Cassone testified that an employee, Marcelino Cortez, told him that during the evening of December 14, he had met with Calderon and Aguilar to discuss his switch from a prounion employee to an antiunion employee and that during their conversation both Calderon and Aguilar threatened him with physical harm if he did not remain

prounion. Although Aguilar was still an employee of Respondent, although on indefinite suspension, Rocky Cassone did not contact Aguilar, or Calderon to get their version of the facts. Rather, he took Cortez to the local police station where he helped him to file a complaint.

On December 20, Aguilar, while in the vicinity of the bakery and campaigning for the Union for the Board election to be held on December 21, was handed a letter of discharge by supervisor Rafael Cardenas.

I need not decide whether such alleged threats to Cortez were actually made since Rocky Cassone made no attempt to interview either Aguilar or Calderon, but rather relied entirely on Cortez's complaint.[4]

The Board has repeatedly held in cases similar to this case, that a factor to be considered in determining whether a discharge is discriminatory is whether an employer conducts an impartial interview with the employee accused of conduct requiring some disciplinary measure, so as to give him an adequate chance to defend himself. *State Bank of India*, 283 NLRB 266, 276 (1987) and cases cited therein.

When I consider that the discharge of Calderon and the indefinite suspension of Aguilar were discriminatorily motivated; that Rocky Cassone did not attempt to contact Aguilar or Calderon to obtain their version of what took place in the van, but instead hurried to the police station with Cortez, to file a complaint against Aguilar and Calderon; that Aguilar was discharged on December 20, the day before the Board election; that both Aguilar and Calderon had been designated by the Union as election observers; that notwithstanding a New York State Court order obtained by the Union providing that Respondent permit both Aguilar and Calderon to enter Respondent's premises for the limited voting period, to act as observers, Respondent defied such court order, refused to permit them on the premises to act as election observers, using the police complaint he had Cortez file as an excuse for such Court defiance, I conclude that Respondent has utterly failed to meet its *Wright Line* burden, and I conclude the discharge of Aguilar was clearly discriminatorily motivated, and a violation of Section 8(a)(1) and (3).[5]

The Suspension of Cabrillo Flores

Cabrilio Flores was a member of the organizing committee and attended union meetings once a week. As an active member of that committee and a leader of the organizing drive, Flores personally distributed around 15 authorization cards.

In February, 2000, Flores was working a 9:00–9:30 a.m. to 10 p.m. shift. On around February 4, 2000, Flores left work early, at approximately 8:30 p.m. Flores credibly testified that he picked up three free loaves of Italian bread, which was consistent with what Flores would do at least two to three times in an average week, without complaint by Respondent . This was Respondent's practice with respect to all employees. On February 4, he left the oven area where is was very hot, and went directly outside of the bakery and walked around to the front where he entered the bakery again and picked up his usual three free loaves of bread from the area where employees are permitted to take bread. Just as soon as he took the bread and began to leave for home, he was approached by Aureilo Viegas, who at this time was an admitted supervisor. Viegas, upon seeing him take the bread, told him that he could not take the bread and that he was causing "problems". Flores said there was no problem and he would pay for the bread if he had to. Viegas said he was causing too many "problems" and should ask the Union to pay for his bread. Flores then left the bread on a nearby table and went home. I specifically credit Flores' testimony about Viegas' statement that he "should ask the Union to pay for his bread."

Three days later, while at work, Flores was handed a 3 day suspension letter by Viegas. Viegas told Flores that David Locke wanted to speak with him, so Flores went upstairs to Locke's office. Once there, Flores was told by Locke that he was not supposed to take home 3 loaves of bread.

Respondent's General Manager David Locke was unsure whether Respondent's bread policy had ever been put in writing, first answering no that it had not, and then yes, that it may have been in a notice posted years before. When asked what the policy was, Locke responded that employees could take a dozen rolls or one loaf. Yet, Viegas testified it was two loaves of bread, not one, and that it was a practice for employees to take bread home every day, which Locke denied. I find such inconsistent testimony reflects adversely upon their credibility. Despite Viegas open acknowledgment that all employees, even himself, take bread home daily, he questioned why Flores had not asked permission before taking bread home, and in fact, directly questioned Flores as to why he was leaving with bread. Viegas' incredibly testified that he saw Flores leave 3 hours prior, at 6 p.m., and this justified his questioning of Flores. Despite this hollow contention, Flores' testimony that he left early at around 8:30 p.m. is corroborated by Respondent's time sheets which establish that on February 4, the day of the incident, Flores clocked out at 8:23 p.m. There was no earlier clocking out at around 6 p.m. on that day. Clearly, Viegas' testimony that Flores had left the bakery 3 hours prior was a ruse to justify his improper questioning of Flores' taking bread that Viegas admits all employees were entitled to take, and to set up a discriminatory suspension of an active Union supporter.

Upon considering the above credible testimony of Flores, the inconsistent incredible and contradictory testimony of Locke and Viegas, I conclude that Respondent has failed to meet its *Wright Line* burden, and find the suspension was a violation of Section 8(a)(1) and (3) of the Act.

The Discharge of Flores

On July 5, Flores was discharged. Flores credibly testified that about 6 p.m., he and his coworker Oscar Bonilla were working at the oven and, as it was very hot, Bonilla had turned

[4] During the course of the trial both Aguilar and Calderon denied making any threats to Cortez. Aguilar testified that although unsuccessful in persuading Cortez to support the Union, he agreed not to tell anyone that he was leaving the union organizing committee.

[5] The Court order obtained by the Union permitting Calderon and Aguilar to enter Respondent's premises for the purpose of acting as election observers and Respondent's refusal to do so will be discussed in further detail below concerning the Union's objections to the election.

the fan which was on, so it faced them. They were baking rolls at the time. The fan is only used for Italian garlic bread to dry it out before it goes into the oven. The fan is not used for rolls. Despite this, at around 6 p.m., supervisor Tony Sena walked through the oven area and seeing the fan turned on, started cursing at Flores, calling him a "mother fucker", an "idiot" and saying that he had told him not to touch the fan. Sena spoke to him in English. Flores understands very little English. Sena, staring at Flores, then told him to get out. Flores immediately left the bakery. He assumed he was terminated. Sena did not yell at Bonilla, who was an antiunion employee. The next day was not a work day for Flores. Two days after his assumed termination Flores tried calling Marylou Cassone on the telephone but was told she was not in. The following day, Flores went to the office. Marylou Cassone was in but did not want to speak with Flores and instructed David Locke to speak to him. Marta, the secretary, translated. Locke asked why Flores had left the job. Flores responded by saying Sena had told him to get out and had insulted and cursed at him. At that point, Locke called Gillermo Serra over the microphone and he came to the office. When asked what had occurred, Serra responded that he had been there and that Sena had not fired Flores. Locke then told Flores that there was no more work for him. Rather than try to clear up the situation that was clearly brought about by a language problem, Locke told him there was no more work for him. Respondent supplied no evidence of an economic layoff. The refusal to let Flores continue with his job does indeed reveal Respondent's intent to eliminate one more union supporter. In any event I conclude Respondent's explanation for refusing to permit Flores to return to work under the circumstances described above, indicates a discriminatory motive. Respondent has clearly not met its *Wright Line* burden. I conclude Flores was terminated in violation of Section 8(a)(1) and (3).

The Discharge of José Mario Castro

As early as September 17, José Mario Castro joined the Union's organizing committee. He also served as the Union's observer at the December 21 election.

On April 3, 2000, Castro credibly testified that he developed a pain in his back and decided he was too ill to attempt going to work. He made several attempts by telephone to contact Respondent's office, but no one answered. Unable to reach anyone by telephone, Castro asked a neighbor of his, fellow employee Alejandro Ponce, to notify his supervisor, Bill Cranisky, that he would not be at work. Ponce did this and relayed to Castro Cranisky's response that his excuse was accepted. Later in the morning, Castro credibly testified, he was able to speak to Cranisky by telephone and when he explained to Cranisky why he would not be in, the response was "okay."

The following morning, as Castro arrived at work and punched his card at around 5 a.m. Castro credibly testified Cranisky approached him, told him not to punch in and asked him to meet in his office. Castro said he had already punched in, to which Cranisky responded that he should not punch in before changing into his work clothes. Castro responded that many coworkers do the same thing. Once in Cranisky's office, Castro was handed a letter discharging him. Cranisky said he should go home and should not be seen again at the bakery. Castro then left.

Respondent asserts that Castro was fired for being late to work and that he had the worst attendance record of all the employees at the bakery. A review of the pertinent records establishes that, while Castro did not have an enviable tardiness record, it was by no means worse than other employees who were not members of the organizing committee and who were not terminated based upon their tardiness records.

A review of the attendance records for the period January 3, 2000 to April 3, 2000, indicates that Castro was tardy a total of 73 times. Seven other employees had equally bad or worse tardiness records for that same period of time. They are Jesus Gonzalez (78), Elvin Vasques (76), Mary Vanegas (78), Feliz Salvador (80), Maria McMahon (73), V. Almeida (74), and Gustavo Cardenas (88). Of these individuals, Felix Salvador and Gustavo Cardenas worked in sanitation along with Castro, and at least Cardenas, according to William Cranisky, is still employed. However, Cranisky claims that the computer records upon which the above numbers are based are not accurate to the extent that he may change the starting times of employees and not have that reflected on the printouts.[6] Incredibly, he suggests that he has no knowledge of the meanings of the notations on these documents, which he reviews each week. For instance, Cranisky maintains that the "L" may not mean lateness, though he was unable to offer any other definition for it. Cranisky is not claiming that such a situation would only apply to Castro so it is a variable that applies equally to each of the employees.

However, it is Castro's singular protected activity of having acted as the Union's election observer that separates him from all the other employees, except Calderon, in his open and unabashed support for the Union. Given the overwhelming evidence establishing Respondent's planned targeting of those employees who supported the Union, the fact that Castro's tardiness record compares exactly with that of other employees were not disciplined, I conclude Respondent acted when it had an opening in order to rid itself of one more union adherent and further dim the chances of any future organizing. In any event I conclude that Respondent clearly failed to meet its *Wright Line* burden. Accordingly, I find that Respondent terminated Castro in violation of Section 8(a)(1) and (3).

The Discharge of Lorenzo Macua

Lorenzo Macua was a member of the Union's organizing committee. He distributed about 18 authorization cards to employees during the Union's organizing campaign.

Macua suffered a work related injury when he was struck with a fork lift on or about September 15, 1999. He was still experiencing periodic pain, although he was working.

On June 27 Macua was in this courtroom prepared to testify on behalf of the General Counsel. On Friday, June 30, Macua credibly testified that he went to the doctor because he was experiencing a pain in his chest. His doctor's appointment was

[6] In fact Cranisky claims to have changed Salvador's and Cardenas' starting times to 5:30 and 7 a.m., respectively. Reviewing the records in light of these starting times would mean minimal latenesses for Salvador and Cardenas.

for 1 p.m. and, later that day, he went to work, arriving around 9 p.m. Macua handed supervisor Tony Vanegas the paper from the doctor which explained why he was late coming to work and requested that he be given light work. While working on his shift, the chest pain returned and, realizing that he could not continue working, Macua told Vanegas that he was unable to continue working. Vanegas said he had to keep working. Macua repeated that he could not. Vanegas said if he wanted to leave, the doors were open. Macua left and went home.

The next day, Saturday, July 1, Macua credibly testified that he called the office and spoke to Marta, the secretary who speaks Spanish. Macua told her that he could not go to work that day as he was still in pain and could not lift one arm. Marta told Macua that he had to bring a doctor's note or else he could not work. Macua repeated he could not work and she hung up the phone. The bakery office was closed on Sunday, July 2.

On Monday, July 3, Macua returned to the doctor's office. After the office visit, Macua credibly testified that he called Respondent's office and spoke with Marylou Cassone. Macua told her that he was unable to go to work and that he had just come from the doctor who told him he could not work as he had a nerve injury. Marylou told him he had to bring a Doctor's note.

On July 5, Macua again in pain went to his doctor. The doctor provided him with a note stating that he was "totally disabled and may not return to work until further notice." After his morning doctor's appointment, Macua credibly testified that he went to the facility and gave Maryou Cassone this doctor's note. Apparently questioning his injury, Marylou Cassone grabbed the doctor's note and threatened to call the doctor and then told Macua that he had no more work with the bakery anymore. I conclude her behavior is clearly one of an employer who is intent on terminating an individual, despite his numerous indications of having suffered a serious on-the-job injury, corroborated by Doctor's notes, and of which Respondent was well aware. Macua acknowledges that he was required to call the office on those days when he was to be late, and in fact, he credibly testified that this is what he did, leaving messages with Marta on July 1, and speaking with Marylou on July 3. Respondent claims that it had warned Macua on June 22 about not notifying them that he was not showing up for work and that on the next occasion that this occurred he would be fired. Nevertheless, taking Respondent's claims at face value, Macua would have been fired on June 30 for arriving to work late without calling. Clearly, then, Respondent was not acting pursuant to any earlier written warning but furthering its grand objectives to prevent any future union organizing. Moreover, I conclude that his appearance at this Court on June 27, was an additional reason for Marylou Cassone's conduct.

Thus I conclude Respondent has failed to establish its *Wright Line* burden. Moreover, since General Counsel also alleges such conduct violated Section 8(a)(1) and (4) of the Act.

I further conclude, Respondent violated Section 8(a)(1)(3) and (4) of the Act.

The Suspension of Roberto Lostanau

As early as September 20, 1999, Roberto Lostanau became a member of the Union organizing committee. Lostanau was known to Respondent as someone who was vocal in speaking out on issues he cared about. At an employee meeting held by Respondent, Lostanau, in connection with the union campaign, responded to a list Marylou Cassone made of all the benefits the employees supposedly had, saying that if we had all of that, why was she fearful of the Union coming in, and that he was working 60 to 70 hours a week and only making $380 per week.

Throughout his 5 years of employment with Respondent, Lostanau would take occasional bathroom breaks without any problem from Respondent. Though there were set breaks of 10 minutes every 3 hours, employees could go to the rest room as long as a coworker was covering for them. On around March 24, after a coworker named Louis Castro returned from a bathroom break, Lostanau in his turn took a bathroom break and asked a coworker named Indio to cover his work station while he went to the bathroom. Respondent's own witness, supervisor, Jose Lemus admits Lostanau had his work station covered. Upon returning to his work station, Losatanau was confronted by Abraham who told him the boss (David Locke) did not like the fact that he took a break and told him to report to David Lock's office. Abraham told him that he could not do whatever he pleased and that he should have asked permission to use the restroom. Lostanau asked why he was taking it out on him and not his coworker who had also gone to the restroom. Lostanau, accompanied by Abraham, then went to Locke's office. Upon entering the office, Lostanau discerned that Locke was quite upset. Locke began speaking in English which Lostanau did not understand, so he raised his hands and said he did not understand what Locke was saying. Locke pointed towards the door and angrily told Lostanau to get out. Abraham then told Lostanau to hand in his time card. Lostanau threw his card onto the desk and left.

The following Monday, Lostanau returned to the office to obtain his expected termination letter. Lostanau saw Locke in the office and was told that he was not fired yet, that Locke was upset at how Lostanau threw his card down. Lostanau was told to return the next day as Locke needed more time to decide whether or not Lostanau would be fired. Lostanau returned the next day but no decision had been made. After 4 days of being suspended, Lostanau was permitted to return to work. Respondent, by David Locke, who was not a witness to Lostanau's break, implied that what Lostanau did during his break was to sit down in the lunchroom. And the sole reason Locke claims to believe Lostanau was in the cafeteria was because Jose Lemus reported to Locke that this is where Lemus saw him. However Lemus' testimony is inconsistent, and not credible. Lemus first testified that he thought Lostanau was in the cafeteria, but in his next response, admits that he did not see him in the cafeteria and denies telling Locke he was in the cafeteria. Incredibly, Lemus thereafter admits that yes, "maybe he went to the bathroom, I don't know." I conclude there is no credible reason as to why Lostanau was called before Locke to justify his having taken a bathroom break according to the admitted practice of having a coworker cover your work station. No reason, that is, other than Respondent's determined efforts to discipline those employees who supported the Union.

Significantly, Lemus, who acted as a translator at the meeting admits the conversation quickly became heated. Critically, he admits that Locke became angry and raised his voice first. This directly supports Lostanau's testimony and contradicts Locke's testimony. Lemus further admits that Lostanau was trying to explain that he did not understand what Locke was saying, when Locked fired Lostanau, telling him to punch out and leave. Lostanau recalls being told to leave his card, but it is clear that an employee cannot work without a card since it is used to punch in. It was immediately after that statement that Lostanau threw his time card on the desk and left.

Respondent's position is unsupported by any credible testimony. Respondent contends Lostanau broke its policy concerning breaks, yet it is clear that Lostanau's action was consistent with Respondent's policy. Respondent's disciplinary letter dated March 29 refers to an unauthorized 15 minute break, yet the record discloses no evidence that Lemus told Locke how long he thought Lostanau's break was. Locke also contends that Lostanau became angry and yelled at him first, threw down his time card, and walked out. However, Respondent's own witness, Lemus, supports Lostanau's testimony that it was Locke who first caused the conversation to turn heated and then told him to leave, which in turn was followed by Lostanau's throwing the card.

Accordingly, I conclude that Respondent failed to meet its *Wright Line* burden, and that such suspension was discriminatorily motivated. I thus find such suspension violates Section 8 (a)(1) and (3).

The Discharge of Salvador Concepcion

The Complaint alleges that the Respondent discharged Salvador Concepcion on or about November 1, 1999 because of his activities on behalf of the Union. The overwhelming testimony presented at the trial shows that Locke terminated Concepcion's employment for viciously striking and attacking his then supervisor, Abey Abraham,[7] on the Bakery's premises and that his union activities had nothing to do with his discharge.

On the day in question, Concepcion gave a union card to his girlfriend, Herrera **(Herrera)** Concepcion. Although he gave conflicting testimony about his whereabouts when Herrera returned the signed union card, he eventually testified that she slipped him the card at the roll machines while he was on working time. On direct examination and in his affidavit to the Board, Concepcion admitted that no one saw her pass the card to him.

Later that day, Herrera and another female coworker had a verbal altercation. Abraham arranged a meeting with the two women and Mary Lou Cassone to resolve their dispute. Subsequently, the two female employees engaged in another verbal altercation. Concepcion immediately leaped to Herrera's aid and interjected himself into the dispute. The women and Concepicion attempted to take their argument to their then leadman, Viegas. Abraham advised Viegas that the matter had been referred to Mary Lou Cassone and not to get involved. Abraham instructed the women to cease their argument and to meet with Mary Lou Cassone the following day. Upon hearing these instruction, Concepcion flew into a rage and began cursing at Abraham.

Abraham walked away and immediately called David Locke, his supervisor, at home for advice regarding the volatile situation. Locke advised Abraham to tell Concepcion to go home and to come see him the following day. Abraham sent Viegas to relay the message while he waited in the drivers' room. Upon hearing the news from Viegas, Concepcion became enraged. Screaming at the top of his lungs, he charged into the drivers' room and sucker punched Abraham with explosive power, in the face. It took three employees to pull Concepcion off Abraham and drag him away. After Abraham recovered, he telephoned Locke, Who advised him to call the police, which he did. Before the police arrived, Concepcion charged after Abraham again, only to be physically restrained by several coworkers. Dennis Scofield an independent route driver and eyewitness, not employed by Respondent, credibly testified that he had a clear and unobstructed view of the drivers' room from his loading bay, about twenty (20) feet away. Scofield witnessed the entire attack and heard the sound of Concepcion's fist hitting Abraham's face. He described it as a "good flat smack."

Scofield's testimony of the punch was so vivid, detailed and descriptive that I was able to imagine the impact of the punch myself. It was a knock out blow. Scofield was not employed by Respondent. He had no reason to shade his testimony in favor of Respondent and I credit his entire testimony. Scofield also spoke with Abraham after the attack and noticed physical evidence of Concepcion's vicious assault—the red weld developing on the side of Abraham's face. Scofield credibly testified that Abraham never raised a hand to Concepcion. The police arrived shortly thereafter to interview all of the parties.

The next day Locke investigated the incident. He spoke with Abraham and observed his physical injuries. He interviewed Viegas and Scofield, both of whom confirmed Abraham's statements. Due to the strong weight of the evidence and the viciousness of the attack, Locke terminated Concepcion for fighting in violation of the Bakery's rules. This entire incident occurred prior to the filing of the election petition. I credit Abraham's testimony in connection with this incident, in view of the solid credibility of Scofield's testimony.

In this regard, Abraham's testimony was detailed, and, most importantly, he was fired by Respondent shortly after this incident for unrelated matters. If anything one would expect a reluctance to testify favorably toward Respondent.

General Counsel contends that Respondent's past practice of dealing with physical altercations at the workplace is inconsistent with the treatment accorded Concepcion. General Counsel witness Juan Martinez described a physical altercation between Rafael Cardenas, a leadman, and a supervisor Moises Contreras where no one was disciplined and another fight between Roberto Salano and Gustavo Cardenas, in which neither employee was disciplined.

On the other hand, Respondent supplied records to establish that Respondent has previously suspended or terminated other employees for the same or substantially similar reasons. For example, in the past 5 years, Respondent terminated three em-

[7] Abraham was an admitted supervisor within the meaning of Sec. 2(11) of the Act.

ployees for fighting: (1) Cipiriana Chavez, terminated on August 8, 1996, (2) Rosendo Valdovinos, terminated on June 8, 1998; and (3) Kurian Shibu, terminated on October 15, 1999.

I conclude that General Counsel has failed to establish disparate treatment. Moreover, I conclude that given the details of this incident, a blockbuster sucker administered to an unsuspecting and defenseless high level supervisor, it is hard to believe that any employer would not have taken the same response as Respondent.

With respect to Concepcion, I conclude Respondent has met its *Wright Line* burden and did not violate Section 8(a)(1) and (3) as alleged.

The Union's Objections

As set forth above a petition for an election was filed by the Union on November 2, 1999, a stipulated election was entered into on November 24, 1999. An election was held on December 21, 1999. The Union lost that election by a wide margin. Out of 177 valid votes counted, the Union received 38 votes; votes cast against the Union were 139. There were 21 challenged ballots.

On December 27 the Union filed timely objections to the conduct of the election. The Union's objections to be decided separately are as follows:

Objection 1—The Employer designated John Cassone as its observer at the 2nd and 3rd sessions of the election. Mr. Cassone is a close relative of the Employer's owners and is a supervisor and/or agent of the Employer.

Objection 3—The Employer refused to allow Mr. Cesar Calderon, the Petitioner's choice to act as its observer, to serve as an observer during the election.

Objection 4—The Employer refused to allow Adan Aguilar, the Petitioner's choice to act as its observer, to serve as an observer during the election.

Objection 5—A number of times during the course of the day of the election, the Employer, by its officers, agents and representatives called the local police and directed them to the Employer's facility and requested that they intervene in the National Labor Relations Board election process. Employees witnessed members of the police force speaking with the Employer's representatives and interrogating the Union's officers and agents and Mr. Calderon and Mr. Aguilar.

Objection 6—A number of times during the course of the day of the election, the Employer requested that the local police intervene and prevent the Union's designated observers from participating in the election.

There were 34 objections, in total filed by the Union. However, objections 7 through 9, 12, and 18 were withdrawn before the trial commenced, Objections 2 and 10 were withdrawn on the first day of the trial. All remaining objections not addressed herein overlap with allegations set forth in the consolidated complaints and have been addressed in the above portion of the decision relating to the unfair labor practices.

The unit described in the stipulated agreement was:

> All full-time and regular part-time production and maintenance employees, including bakers, packers, shippers, mechanics, porters and sanitation employees, drivers and retail clerks, employed by the Employer at its facility located at 202 South Regent Street, Port Chester, New York.

Objection 1

Unless otherwise agreed to by the parties, observers for the employer must be selected from among its nonsupervisory staff and be persons not closely identified with the employer. The Board has consistently held that "the presence of a supervisor or one who is closely allied with management as an observer is inherently coercive as their presence at polls may unduly influence employees." *Bosart Co.*, 314 NLRB 245, 247 (1994). See also *Worth Food Market Stores, Inc.*, 103 NLRB 259, 260 (1953) (It is well established Board policy that supervisors or agents may not act as observers for an employer). Elections have been set aside for these reasons alone. *Mountain States Telephone and Telegraph Co.*, 207 NLRB 552, 553 (1973). In fact the National Labor Relations Board Casehandling Manual provides that "the use of an ineligible observer may result in the election being set aside through the objection process." Jon Cassone, as set forth above, is a agent of Respondent within the meaning of Section 2(13) of the Act. Although he was agent, he nevertheless wore the uniform of green shirt and green pants, worn by supervisors. Jon Cassone was identified by Flores as sitting at the voting table during at least one of the three voting sessions while wearing the green supervisor uniform. It was stipulated by both parties that Jon Cassone was appointed as an observer by the Respondent for the second and third voting sessions. I find that Jon Cassone's presence as an observer is sufficient to set aside the election.

Even if Jon Cassone's supervisory status were not made clear by the record, it is beyond dispute that he is closely identified with Respondent as an agent. Such persons cannot be selected by the employer to act as observers. *Bosart* at 247. The Board has held that *relatives* of the employer are closely identified with the employer and therefore are prevented from acting as observers. *International Stamping Co.*, 97 NLRB 921, 922 (1951) (a sister-in-law to the employer should have been prohibited from acting as an observer); *Wiley Mfg.*, 93 NLRB 1600, 1601 (1951).

Jon Cassone's familial relation with the owners of the Respondent, as set forth in detail above, is clearly sufficient to create a close enough alliance with the employer rendering a free election impossible. Jon Cassone admitted in his direct examination that he knows the owners of the Respondent bakery, Mary Lou and Rocky Cassone. He shares the same last name as the owners and in fact they are second cousins. I find that his obvious relation to the employer made his presence at the voting table as an observer for the Respondent unlawful. The voting employees seeing this man who, by relation, and his clear status as an agent, is closely affiliated with Respondent's ownership could have been unduly influenced into voting against the Union. The wrongful presence of such relative and agent of Respondent at the voting table acting as an observer is enough to destroy the laboratory conditions and warrant setting aside the election.

Based upon Jon Cassone's familial relationship with Respondent, I conclude Jon Cassone's presence as an observer at the election was sufficient to set aside the election.

Objection 2–5

The procedures for the conduct of elections are designed to insure, as much as possible, that the outcome reflects a free and fair choice of the voters, It is the Board's duty to "provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." *General Shoe Corp.*, 77 NLRB 124, 127 (1948). Observers help the Board fulfill this function. Any party may be represented at the voting by observers of its own selection. Refusing to permit persons selected by the Union to act as observers is a violation of the "obligation to permit the Union to designate an observer of its choice" and is therefore objectionable conduct for which an election may be set aside. *Kellwood Co.*, 299 NLRB 1026, 1029 (1990). It is well established that "an employee who has been discharged, and whose discharge is the subject of an unfair labor practice charge, may serve as an observer at an election." Id. See also *Zelrich Co.*, 144 NLRB 1381 (1963). Therefore it is clear that absent special circumstances both Calderon or Aguilar were entitled to act as observers.

Respondent contends that due to the alleged threats made against Marcelino Cortez, described above, an Order of Protection was issued by a New York State Court, finding that such special circumstances existed which made it reasonable that they could be barred from acting as observers.

However, the same Court, upon application by the Union issued a "Modified Order of Protection expressly permitting Calderon and Aguilar" to be inside, so as to be able to act as observers and in the vicinity of the J.J. Cassone Bakery, Inc. on the day of the election. The police officers called by Respondent to insure no physical confrontations examined the "Modified Order" and informed and showed Respondent's owners and officers this "Modified Order." Notwithstanding such "Modified Order," Respondent chose to disregard such Court Order. Respondent continued to refuse Calderon and Aguilar access to the building throughout the day as voting continued. Id. In fact, the police together with the employer's attorney, Marc Silverman, refused their request to contact the Board agent, who was inside the facility preparing the voting area. Calderon and Aguilar never participated as observers as the Union and the Court had directed. The Union, at the last minute had to find replacement observers. This last minute change placed the Union at a disadvantage because it had to quickly locate several employees who would be familiar with over 200 potential voting employees and able to assert challenges where appropriate.

What makes the Respondent's refusal to allow the Union's choices of observers to perform their task more insidious is the fact that Calderon and Aguilar were two of the Union's most vocal and visible supporters. Calderon and Aguilar were both members of the union organizing committee. In fact they were the most active members, as described above. To call the police and physically bar Calderon and Aguilar, the most active union advocates, from participating as union observers notwithstanding the "Modified Court Order," taints the "laboratory" conditions ideal and necessary for a fair and free election. Respondent clearly attempted to influence voters by restricting Calderon's and Aguilar's access to the voting area as observers. The voters witnessed this prevention by both Respondent and by the police, of Calderon and Aguilar to act as observers. Such action could reasonably be expected to have adverse action taken against them if they too were shown to be union supporters. I find such action unlawful and sufficient alone to set aside the election.

When the conduct of the police creates a "general atmosphere of confusion or fear of reprisal such as to render impossible the free and untrammeled choice of a bargaining representative," the Board will set aside the election. *The Great Atlantic & Pacific Tea Co.*, 120 NLRB 765, 767 (1958). In that case there was no evidence showing that the employer even had anything to do with the arrest of the principal organizer just prior to the start of the election. Id. The arrest of the organizer "before the eyes of a number of eligible voters only minutes before they were scheduled to vot . . . was sufficient to create" such an atmosphere of confusion. Id. Though police presence alone has not been considered sufficient consequence to require a new election, where "they inject themselves into election issues" or "speak to any employees or voters during the election," the election environment becomes tainted. *Louisville Cap Co.*, 120 NLRB 769, 771 (1958).

The evidences in this case establishes that the police were first called by the Respondent and its agents prior to 9 a.m. on the morning of the election. The police were instructed by Respondent that union representatives, Atkins (the Union Secretary/Treasurer), Calderon and Aguilar were trespassing. The police officers' presence created a "commotion." There was a window from the voting area where this commotion could be viewed. But more importantly, the exchange among the police officers, the employers and the union representatives occurred near the *entrance* to the voting area. Many employees witnessed the exchange as the uniformed police officers and their vehicles were in clear view.

For the afternoon voting session, Respondent called the police again; they were present at the employer's facility at about 12:55 p.m., just prior to the 1 p.m. voting session. Again, the police officer this time was uniformed, armed and had a police vehicle parked in clear view of the voting area. The police officer approached Atkins, Calderon, and Aguilar and two other union representatives and asked if they "were the trespassers." The police barred the group from entering the premises. Again, the exchange between the police, the employer and the union representatives were in clear view of and witnessed by voting employees.

The police in this case did not merely stand by mute; they injected themselves into the election by talking to employees Aguilar and Calderon and asking them to leave the premises. In clear sight of voting employees, the police spoke to Atkins, Calderon, and Aguilar and prevented their entry into the voting area. The Board has found that this kind of conduct by police destroys the laboratory conditions required for elections. *The Great Atlantic & Pacific Tea Co.* at 767. I conclude for such conduct alone, free and untrammeled election could not possibly take place under such conditions and the election should be set aside.

In addition, I conclude for each and every unfair labor practice I have found, which occurred during the critical period,

beginning November 2, 1999, the date the petition for election was filed and December 21, 1999, the date of the election, I conclude the election should be set aside.

REMEDY

Having found that Respondent engaged in violations of Section 8(a)(1) and (3) of the Act, I find that Respondent must be ordered to cease and desist therefrom, and take affirmative action designed to effectuate the policies of the Act.

In addition, in view of my finding that Respondent committed various violations of Section 8(a)(1) and (3) of the Act, described above, within the period that the petition for election was filed (November 2, 1999) and the date the election was held (December 21, 1999) and in addition committed various acts not alleged as unfair labor practice violations, but as conduct affecting the results of the election, which I have also concluded, discussed above, that Respondent did commit, I shall order a new election.

With respect to those employees I have concluded that Respondent suspended and or, discharged in violation of Section 8(a)(1) and (3), I recommend they be reinstated to their former positions of employment, or if such positions no longer exist, substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed by them.

All of the above employees suspended and, or discharged must be made whole for any loss of earnings or other benefits suffered as a result of the discrimination against them, with back pay for the period of their unlawful suspension, and if discharged, from the date of their unlawful discharge, until Respondent offers them unconditional reinstatement as defined by Board authority.

Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950) with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In addition, Respondent must be ordered to remove from the files of those employees suspended and, or discharged any reference of such action and notify the employees that this has been done, and these personnel actions will not be used against them in any way.

Based upon the findings of facts, and conclusions of law as described above, I issue the following recommended[8]

ORDER

The Respondent, J.J. Cassone Bakery, Inc., its officers, successors, and assigns, shall

1. Cease and desist from

(a) Suspending, and discharging its employees because of their membership in, and or their activities on behalf of the Union.

(b) Threatening its employees with discharge or suspension, because of their membership in, and or activities on behalf of the Union.

(c) Threatening its employees with unspecified reprisals, because of their membership in, and or their activities on behalf of the Union.

(d) Harassing its employees engaged in lawful Union activities outside Respondents facility following their unlawful discharge.

(e) Threatening its employees with loss of economic and non economic benefits, or other changes in hours of work or in other working conditions.

(f) Promising its employees benefits to induce them abandon their membership in, or activities on behalf of the Union.

(g) Interrogating its employees concerning their membership in, and or activities on behalf of the Union.

(h) Creating the impression among its employees that their activities on behalf of the Union are under surveillance by Respondent's representatives.

(i) Informing its employees that it would be futile for them to engage in activities on behalf of the Union.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this ORDER, offer to: Cesar Calderon, Adam Aguilar, Cabrilio Flores, Jose Mario Castro, Lorenzo Macua their former positions of employment, or if such positions no longer exists, to a substantially equivalent position of employment, without prejudice to their seniority or other rights and privileges they previously enjoyed.

(b) Within 14 days of this Order make whole in the manner set forth in the Remedy provisions of this decision those employees discharged by Respondent, described above in this Order, from the date of their discharge, until the date of a valid offer of employment or reinstatement. As to the suspensions of Cesar Calderon, Adam Aguilar, Cabrilio Flores, and Roberto Lastanau, such employees must be made whole for the period of their suspension.

(c) Within 14 days of this Order, expunge from their files any reference to the unlawful refusal to employ the employees named above including Lok, and notify them in writing that this has been done and that these personnel actions will not be used against them in any way.

(d) Within 14 days after service by the Region, post at its New York, New York facility copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided buy the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Further, and in accordance with *Lufkin Rule Co.*, 147 NLRB 341 (1964), and *Fieldcrest Cannon, Inc.*, 327 NLRB

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

109 fn. 3 (1998), I recommend that the following notice be issued in the Notice of Second Election:

**NOTICE TO ALL VOTERS**

> The election conducted on December 21, 1999, was set aside because the national labor Relations Board found that certain conduct of the Employer interfered with the employees' exercise of a free and reasoned choice. Therefore, a new election will be held in accordance with the terms of this notice of election. all eligible voters should understand that the National labor Relations Act, as amended, gives them the right to cast their ballots as they see fit, and protects them in the exercise of this right, free from interference by any of the parties.

DATED: New York, NY January 31, 2002

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT suspend or discharge our employees because of their membership in, and or their activities on behalf of the Union.

WE WILL NOT threaten our employees with discharge or suspension, because of their membership in, and or activities on behalf of the Union.

WE WILL NOT threaten our employees with unspecified reprisals, because of their membership in, and or their activities on behalf of the Union.

WE WILL NOT harass our employees engaged in lawful union activities outside our facility following their unlawful discharge.

WE WILL NOT threaten our employees with loss of economic and noneconomic benefits, or other changes in hours of work or in other working conditions.

WE WILL NOT promise employees benefits to induce them to abandon their membership in, or activities on behalf of the Union.

WE WILL NOT interrogate our employees concerning their membership in, and or activities on behalf of the Union.

WE WILL NOT create the impression among our employees that their activities on behalf of the Union are under surveillance by our representatives.

WE WILL NOT inform our employees that it would be futile for them to engage in activities on behalf of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL reinstate Cesar Calderon, Adam Aguilar, Cabrilo Flores, Jose Mario Castro, and Lorenzo Macua and make them whole for any loss of earnings and other benefits they may have incurred, and reimburse them for any federal and/or state income taxes that would or may result from the lump sum payment of their backpay award.

WE WILL remove from our files any references to the discharges and suspension above and will notify these employees in writing that this has been done and that these discharges and suspension will not be used against them in any way.

J. J. CASSONE BAKERY, INC.